

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
JEMIL A. ARAZI and LAND)
DEVELOPMENT AND SERVICES, INC.,)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 82-182
FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a Department of Ecology Order of Cancellation on Ground Water Permit G4 24052P, came on for formal hearing August 5, 1983, in Lacey before the Pollution Control Hearings Board; Larry Faulk, David Akana, and Gayle Rothrock (presiding). The proceedings were reported by Bibi Carter, of Olympia, and were also electronically recorded.

Appellants were represented by their attorney J. Anthony Hoare. Respondent agency was represented by Patricia H. O'Brien, Assistant Attorney General.

1 One witness was sworn and testified. Exhibits were admitted and
2 examined. Oral and written argument was presented. From this the
3 Board makes these

4 FINDINGS OF FACT

5 I

6 Land Promotion and Development Services, Inc., and Jemil Araz
7 (hereinafter "appellant") holds title to a sizeable quantity of land
8 in Kittitas County near Ryegrass (hill) and Vantage part of
9 which--approximately 7,000 acres--they have identified as developable
10 in "ranchettes" to be served by a community domestic water supply.

11 The properties were first purchased in 1972 under three individual
12 investors' names. Currently just one of these individuals is listed
13 as an owner.

14 II

15 In 1975 the appellant investors had a well drilled in the NW 1/4
16 of the NW 1/4 of Section 23, Township 18 North, Range 20 East W. M.,
17 in the Parke Creek drainage near Whisky Dick and the Wenatchee
18 mountains on his property. "Good" water was located with artesian
19 characteristics and a shut-in pressure of 40 pounds. The well was
20 valved-off at the wellhead. Before the completion of that action
21 appellant applied for a groundwater permit from the Department of
22 Ecology (DOE). In October 1977, after examination and analysis, DOE
23 issued a report allowing appropriation of 1785 gallons per minute for
24 community domestic supply, not to exceed 119 acre feet per year, with
25 a 3 year period to bring water to full use.¹

26
27 ¹. Allowance of time to bring water to full use is commonly known as
perfecting a permit.

1 III

2 When the proposed water appropriation was under consideration by
3 the Department the site was inspected and the nature of the proposed
4 development was discussed with an agent for the appellant investors to
5 assist in determining a permit perfecting schedule. While the
6 project, as outlined, is ambitious a standard development schedule was
7 assigned to the subject appropriation. There was no appeal from the
8 development schedule established. This area is not noted for heavy
9 ground water development and there is no evidence of heavy competition
10 for development of land or water resources at this site.

11 IV

12 Since 1977 a Kittitas County landfill was proposed and developed
13 near Ryegrass, about ten miles from appellant's well site.
14 Appellant's agent expressed some concern about this in the past. The
15 geology and topography of the land and underground waters are
16 configured such that any leaching from the landfill would not
17 interfere with appellant's well, if it were operating.

18 V

19 During recent years a major oil company commenced drilling on
20 appellant's property by Whisky Dick Mountain. This was done with
21 appellant's permission under agreement. Appellant is reportedly
22 unaware of the test results of the first drilling or of the oil
23 company's future interest in the area. The beneficial use of
24 appellant's well water could conceivably be changed if oil, gas, or
25 important minerals are located.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
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1 VI

2 Appellant or its agent have taken no development action with the
3 well or the appurtenant property since the well was drilled in 1975.
4 The project was to have begun by October 1978, to be complete by
5 October 1979, with water being put to full use by October of 1980.

6 Appellant's agent first asked for an extension of development time
7 in September of 1979. In January of 1981 the agent again asked for an
8 extension. After an exchange of correspondence the Department
9 extended the construction completion date to October 1, 1981. In
10 November of that year yet another extension was requested and further
11 correspondence exchanged.

12 Failing to find the appellants moved forward with their
13 development using due diligence, the Department, in May 1982, notified
14 the agent there would be no further extensions and the permit
15 cancellation process would initiate.

16 In October of 1982, DOE issued an Order of Cancellation. From
17 this appellant Arazi and Land Promotion and Development Services
18 appeals.

19 VII

20 Any Conclusion of Law which should be deemed a Finding of Fact is
21 hereby adopted as such.

22 From these Findings the Board comes to the following

23 CONCLUSIONS OF LAW

24 I

25 The Board has jurisdiction over these persons and these matters.
26 RCW 43.21B.110.

1 II

2 Land Promotion and Development Services and Jemil Arazı did not
3 present evidence which would show why the State should not cancel the
4 water appropriation permit for failure to exercise due diligence and
5 good faith in perfecting this subject permit under terms of the State
6 Water Code. RCW 90.03.290 and 90.44.020. However, nothing prevents
7 appellant from applying for a permit to appropriate water for
8 beneficial uses if that is to be undertaken at a time certain.
9 RCW 90.03.290.

10 III

11 The Department has established by clear and convincing evidence
12 that appellant, and its individual agent, have not worked towards
13 completion of construction and beneficial use of water in order that
14 its permit, G4 24052P, be perfected. Waiting on owners who are out of
15 the country for years or holding up one kind of development based on
16 an alternative land use possibility are not examples of good faith
17 which can occasion repeated extensions of the development schedule.
18 RCW 90.03.320.

19 IV

20 Even if appellants' current permit merited an extension of the
21 development schedule, any proposed change in either the purpose or the
22 place of use of the well water must be applied for and approved by DOE.

23 V

24 The State Department of Ecology's Order of Cancellation of
25 G4 24052P was issued on reasonable grounds for good cause and should
26 be affirmed. RCW 90.03.320.

VI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Department of Ecology's Order of Cancellation of Ground Water Permit G4 24052P, issued October 7, 1982, is affirmed.

DATED this 17th day of August, 1983.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

David Akana
DAVID AKANA, Lawyer Member

See dissenting opinion
LAWRENCE J. FAULK, Member

1 BEFORE THE
2 POLLUTION CONTROL HEARINGS BOARD
3 STATE OF WASHINGTON

3 IN THE MATTER OF)
4 JEMIL A. ARAZI AND LAND)
5 DEVELOPMENT AND SERVICES, INC.)

6 Appellants,)

PCHB NO. 82-182

6 v.)
7 STATE OF WASHINGTON)
8 DEPARTMENT OF ECOLOGY)

DISSENTING
OPINION

8 Respondent.)
9 _____

10 This matter, the appeal of a Department of Ecology Order of
11 Cancellation on Ground Water Permit G4 24052P, came on for formal
12 hearing August 5, 1983, in Lacey before the Pollution Control
13 Hearings Board; Larry Faulk, David Akana, and Gayle Rothrock
14 (presiding). The proceedings were reported by Bibi Carter, of
15 Olympia, and were also electronically recorded.

16 Appellants were represented by their attorney J. Anthony
17 Hoare. Respondent agency was represented by Patricia H. O'Brien,
18 Assistant Attorney General.

One witness was sworn and testified. Exhibits were admitted

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PCHB No. 82-182

1 and examined. Oral and written argument was presented. From
2 this the Board makes these

3 FINDINGS OF FACT

4 I

5 The appellant, Land Development Promotion Services, Inc.
6 (L.D.P.S.), acquired substantial acreage in Kittitas County in
7 approximately 1972. Subsequent purchases of additional acreage
8 were made substantially increasing the total acreage. Beginning
9 in 1975, expenses were incurred for engineering and surveying and
10 for investigation of alternative uses of the property. At that
11 time appellant determined that a substantial portion of the
12 property could be divided into 20 acre or 40 acre parcels
13 provided the purchasers of such parcels could have reasonable
14 assurance of an adequate water supply for recreation, domestic,
15 or small scale agricultural uses.

16 II

17 In 1975 the appellant had a well drilled in the NW 1/4 of
18 the NW 1/4 of Section 23, Township 18 North, Range 20 East W. M.,
19 in the Parke Creek drainage new Whisky Dick and the Wenatchee
20 mountains on his property. Good water was located with artesian
21 characteristics and a shut-in pressure of 40 pounds. The well
22 was valved-off at the wellhead. Before the completion of that
23 action appellant applied for a groundwater permit from the
24 Department of Ecology (DOE). In October 1977, after examination
25

26 DISSENTING
27 OPINION
PCHB No. 82-182

1 and analysis, DOE issued a report allowing appropriation of 1785
2 gallons per minute for community domestic supply, not to exceed
3 119 acre feet per year, with a three year period to bring water
4 to full use.*

5 III

6 When the proposed water appropriation was under
7 consideration by the Department the site was inspected and the
8 nature of the proposed development was discussed with an agent
9 for the appellant investors to assist in determining a permit
10 perfecting schedule. While the project, as outlined, was
11 ambitious, a standard development schedule was assigned to the
12 subject appropriation. This area is not noted for heavy
13 groundwater development and there is no evidence of competition
14 for development of land or water resources at this site.

15 IV

16 The total number of acres owned by appellant is
17 approximately 25,000. Although it was never contemplated that
18 the total acreage would be developed, sold or subdivided in the
19 foreseeable future, a substantial number of acres were proposed
20 to be subdivided, minimally developed and sold, or used for
21 recreational, residential or small agricultural uses. A
22 development of this size would have required substantial
23 expenditure of dollars for roads and water and power distribution

24 *Allowance of time to bring water to full use is commonly known as
25 perfecting a permit.

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1 systems. Appellant contends that the general state of the
2 national and northwest economy dampened the real estate market so
3 significantly that any development or attempt at sales of a
4 substantial number of parcels of property was not economically
5 feasible.

6 As an alternative to subdivision, an agreement was entered
7 into with Shell Oil Company whereby Shell Oil was to complete a
8 substantial test drill exploring for oil, gas or other important
9 minerals. The first test drilling on the subject property has
10 been completed but the test results are not available. A
11 discovery of gas, oil or other minerals in marketable quantities
12 could have not only a substantial impact on the northwest
13 economy, but also more specifically on the subject property and
14 surrounding properties and could, also create a substantial and
15 fairly immediate need for a beneficial use of the water subject
16 to the permit. Appellant contends the extent of such need, its
17 location, and the exact timing cannot now be determined with any
18 precision.

19 V

20 Kittitas County, beginning in 1979, began exploring the use
21 of adjacent property for a solid waste disposal site. The
22 appellant expressed objection to the use of this site because of
23 the possible contamination of its extremely pure and high quality
24 water source. Objections were expressed to the Department of
25

1 Ecology by letter dated November 14, 1977. A professional
2 opinion rendered by Steven E. Farkas, Ph.D., who is associated
3 with the Department of Geology in Physics at Central Washington
4 University in Ellensburg, Washington indicated that the location
5 of the proposed solid waste disposal site might have an adverse
6 effect on the appellant's water source. In addition a memorandum
7 from Chuck Cline, geologist, directed to the Department of
8 Ecology dated April 5, 1979, also indicated the possibility of
9 contaminants leaching into the appellant's well water source.

10 Despite the reports indicating possible contamination of a
11 valuable water source, the solid waste disposal site was
12 approved, and is presently being operated by Kittitas County.
13 The establishment of this waste disposal site placed the
14 appellant in the position that any potential user, or purchaser
15 of all or any portion of the subject property would have to be
16 advised of possible contamination of water. The appellant
17 thought he had to risk incurring a substantial loss in the value
18 of its property because of the unfortunate disclosures which
19 would have to be made, or would have to hold the property and
20 just "wait and see" whether the water source becomes in time
21 contaminated.

22 Testimony at the hearing indicated that the geology and
23 topography of the land and underground waters are configured such
24 that any leaching from the landfill would not interfere with
25

1 appellant's well, if it were operating. Appellant contends this
2 was the first time he had heard definitely that this was the
3 case.

4 VI

5 Appellant contends that because of the developments listed
6 in Findings of Fact No. IV and V no development action with the
7 well or the appurtenant property has been inoperative since the
8 well was drilled. The project was to have begun by October 1978,
9 to be completed by October 1979, with water being put to full use
10 by October of 1980.

11 VII

12 Appellant's agent first asked for an extension of
13 development time in September of 1979. In January of 1981 the
14 agent again asked for an extension. After an exchange of
15 correspondence the Department extended the construction
16 completion date to October 1, 1981. In November of that year yet
17 another extension was requested and further correspondence
18 exchanged.

19 In May 1982, the Department, failing to find the appellants
20 acted faithfully with due diligence; in completing the
21 development, the Department notified the agent there would be no
22 further extensions and the permit cancellation process would
23 initiate.

1 On October 7, 1982, DOE issued an Order of Cancellation.
2 From this appellant Arazı and Land Promotion and Development
3 Services appealed to this Board on November 3, 1982.

4 VIII

5 Any Conclusion of Law which should be deemed a Finding of
6 Fact is hereby adopted as such.

7 From these Findings the Board comes to the following

8 CONCLUSIONS OF LAW

9 I

10 The Board has jurisdiction over these persons and these
11 matters. RCW 43.21B.280.

12 II

13 RCW 90.03.320 provides:

14 Actual construction work shall be commenced on any
15 project for which permit has been granted within such
16 reasonable time as shall be prescribed by the
17 supervisor of water resources, and shall thereafter be
18 prosecuted with diligence and completed within the time
19 prescribed by the supervisor. The supervisor, in
20 fixing the time for the commencement of the work, or
21 for the completion thereof and the application of the
22 water to the beneficial use prescribed in the permit,
23 shall take into consideration the cost and magnitude of
24 the project and the engineering and physical features to
25 be encountered, and shall allow such time as shall be
26 reasonable and just under the conditions then existing,
27 having due regard for the public welfare and public
interest affected; and for good cause shown, he shall
extend the time or times fixed as aforesaid, and shall
grant such further period or periods as may be
reasonably necessary, having due regard to the good
faith of the applicant and the public interest
affected. If the terms of the permit or extension
thereof, are not complied with the supervisor shall
give notice by registered mail that such permit will be

1 cancelled unless the holders thereof shall show cause
2 within sixty days why the same should not be so
3 cancelled. If cause be not shown, said permit shall be
cancelled (1917 c 117 § 33: RRS § 7385. Formerly RCW
90.20.090.) (Emphasis added)

4 III

5 There have been significant intervening events since the
6 initial application and grant of the water permit which have
7 precluded the beneficial appropriation and use of the water
8 pursuant to this permit.

9 IV

10 The initial schedule established by the Department of
11 Ecology and agreed to by appellant was unreasonable concerning
12 the scope and magnitude of the project.

13
14 V

15 The Department of Ecology has authority to extend a permit
16 beyond any term initially established for actual appropriation or
17 use of water and should continue the appellant's permit until the
18 permit is perfected by appropriation and use or, if earlier,
19 until a subsequent application is made by a third person which,
20 if granted, would preclude that continuance of appellant's permit
21 or would be in conflict therewith because of the quantity of
22 water applied for or the detriment to the water source that might
23 result if both permits were granted and water was appropriated
24 for beneficial use pursuant thereto.

1 VI

2 Abandonment or non-use of water pursuant to a permit or by
3 virtue of a prior vested use is no longer the basis for
4 cancelling a permit.

5 VII

6 There is no conflicting request for use of any groundwater
7 from the well drilled by appellant.

8 VIII

9 The State Department of Ecology's Order of Cancellation of
10 G4 24052P was unreasonable and should be reversed. RCW
11 90.03.320.

12 Any Finding of Fact which should be deemed a Conclusion of
13 Law is hereby adopted as such.

14 From these Conclusions the Board enters this
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26 DISSENTING
27 OPINION
PCHB No. 82-182

ORDER

The Department of Ecology's Order of Cancellation of G4 24052P, issued October 7, 1982, is reversed and remanded to DOE for reissuance of a permit with a reasonable development schedule.

POLLUTION CONTROL HEARINGS BOARD

 6/17/83

LAWRENCE J. FAULK, Member

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